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WARISAN PINANG SDN BHD v. LEMBAGA RAYUAN NEGERI PULAU PINANG & ORS

HIGH COURT MALAYA, PULAU PINANG
QUAY CHEW SOON JC
[JUDICIAL REVIEW NO: PA-25-57-10-2020]
B 28 MARCH 2022

Abstract – *The amended planning permission, upon being proven to be a continuation of the initial planning permission, approved pursuant to the Town and Country Planning Act 1976, and where the density of the development was still within the maximum density approved in the original planning permission, ought not to have been set aside by the Appeals Board. In approving the original planning permission, the local authority had taken into account various considerations and the Appeals Board had acted illegally, irrationally and unreasonably in setting aside the amended planning permission and therefore, the applicant's application for judicial review was allowed.*

ADMINISTRATIVE LAW: *Judicial review – Certiorari and mandamus – Application against decision of Appeals Board setting aside part of amended planning permission granted by local authority – Whether local authority taken into account relevant planning considerations – Whether guidelines to amend original planning permission considered before approval granted – Whether amended planning permission proper – Whether decision by Appeals Board tainted with illegality, irrationality and unreasonableness – Whether intervention warranted*

LOCAL GOVERNMENT: *Building – Planning permission – Application to amend planning permission allowed by local authority – Appeals Board set aside part of amended planning permission based on density of undeveloped lots – Whether original planning permission and amended planning permission related to planning of same land – Whether continuous development – Whether increase in density of development within maximum density of original planning permission – Whether Appeals Board wrong to exclude parts of original land under master title in calculation of density – Whether decision by Appeals Board tainted with illegality, irrationality and unreasonableness – Town and Country Planning Act 1976, s. 22(2), (3) & (4)*

The applicant is the registered owner and developer of the land held under the original title with an acreage of 27.8294 acres ('master title'). The applicant submitted an application for planning permission to develop the master title and obtained the approval of the fourth respondent ('MBPP') to construct 689 units of houses and condominiums at a density of 24.75 units per acre ('original planning permission'). The development on the master title was divided into three phases and therefore, the master title was

surrendered and re-alienated into three separate titles and subdivided titles were issued to replace the master title. At the same time, portions of the land for public facilities which included the roads, pump house, TNB substation and other public facilities were surrendered to the State Authority. After completion of parcel 1 and more than ten years since the application for the original planning permission, the applicant decided to proceed with the development of parcels 2 and 3. Due to the site conditions, where substantial rocks were discovered at the area designated for parcel 3, the applicant submitted an application to amend the original planning permission. Also, in view of the market demand for condominiums in the Penang Island in 2012, the applicant applied to increase the density to 34.39 units per acre. The application to amend was approved by MBPP ('amended planning permission'). Aggrieved with the decision of MBPP, three owners of a three-storey terrace houses from the adjoining land appealed to the first respondent's ('Appeals Board') pursuant to s. 22(3) of the Town and Country Planning Act 1976 ('TCPA'). In allowing the appeal, the Appeals Board set aside part of the amended planning permission by making an order that part of the amended planning permission in respect of the development of phase 2B for the construction of two blocks of 20 storey condominium comprising of 160 units and 120 units be annulled. Hence, the applicant, in this application for judicial review, sought to challenge the decision of the Appeals Board.

Held (allowing application):

(1) Section 22(2) of the TCPA sets out matters that the local planning authority must take into consideration in dealing with an application for planning permission. All planning matters in a State are decided by the State Authority, the State Planning Committee and the local planning authority, taking into account the framework of the national policy. But the State Planning Committee is entitled on its own initiative to advise the State Government on matters relating to the conservation, use and development of land in the State. In considering and granting an application for planning permission, the local planning authority has to take into account the matters stated in s. 22(3) and 22(4) of the TCPA. Since the local plan is yet to be gazetted, in the State of Penang, the relevant development plan to be considered is the structure plan. On matters relating to the construction of building, it is the local planning authority that will give directions on various matters relating to the level of the site of the building, elevations, line of frontage and set back of the building to a building line, as provided in s. 21(3) of the TCPA. (paras 24, 26 & 29-31)

(2) The Appeals Board had set aside the amended planning permission in part based on the issue of density of the undeveloped lots. The Appeals Board excluded the land area for phase 1, which had already been developed, from the density calculation for the amended planning

permission. However, the original planning permission and the amended planning permission were not separate applications that are independent of each other. They were related to the planning of the same land *ie*, the master title. The amended planning permission in effect was an amendment to the original planning permission which sought to amend the development already approved by MBPP pursuant to the original planning permission. (paras 35 & 39)

(3) Pursuant to the amended planning permission application, the density of the development was increased from 24.75 units per acre to 32.37 units per acre and it was approved by MBPP as the density was still within the maximum density of 39 units per acre calculated based on the approval of the original planning permission. Reference had been made to the master title and the original planning permission when the amended planning permission was approved. Under the title 'perihal tanah', reference was made to the size of the master title and the subdivided titles and these plans were signed by the applicant and its architect, town planner and engineer and approved by MBPP. Thus, all parties concerned were fully aware that the application they were dealing with was an application to amend the original planning permission. Reference was also made to the original planning permission in the comments by Jabatan Perancang Bandar dan Desa Pulau Pinang ('JPBD') confirming that it had no objections to the amended planning permission subject to, *inter alia*, the condition that it must be read together with the original planning permission. (paras 41, 42 & 45-47)

(4) Since there was already an existing master plan which was subsisting for the development of the master title, it did not make sense for a separate and distinct application to be submitted. The amended planning permission was an amendment to the original planning permission as it was a continuous development of the same piece of land which was the master title. The master title was subdivided based on the component of the development which the applicant had intended to develop under phases 1, 2 and 3. After the master title was subdivided, phase 1 was developed but, the land area for phases 2 and 3 under the original planning permission remained undeveloped. The amended planning permission was for the same undeveloped land for phases 2 and 3 under the original planning permission. Just that the component for development was now amended and divided into phases 2A, 2B and 3. (paras 51, 55, 57 & 58)

(5) The crux of the density calculation in terms of planning is to ensure that sufficient infrastructure is provided on a macro level for the development. The development pursuant to the amended planning permission was set on parts of the original land under the master title which had been surrendered and subdivided pursuant to the original

planning permission. Thus, the applicant was entitled to take into account the total area of the original land in the master title for the purpose of calculating the density for the amended planning permission. The Appeals Board was wrong to exclude parts of the original land under the master title which had been developed or surrendered to the relevant authorities pursuant to the original planning permission. (paras 61 & 67)

(6) MBPP had taken into account the relevant planning considerations before approving the amended planning permission and the relevant documents and MBPP's guidelines in considering the applicant's application to amend the original planning permission. The amended planning permission was proper and ought not to have been annulled by the Appeals Board. In setting aside part of the amended planning permission, the Appeals Board had acted illegally, irrationally and unreasonably, warranting this court to intervene and allow the applicant's application for judicial review. (paras 37, 73 & 78)

Case(s) referred to:

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Legislation referred to:

Town and Country Planning Act 1976, ss. 2, 4(4)(a), (b), 21(3), 22(2), (2A), (3), (4), 24(1)

For the applicant - B Thangaraj & M Nalani; M/s Thangaraj & Assoc
For the 2nd & 3rd respondents - Cheah Ee Keong; M/s See, Ramsun & Tan
For the 4th respondent - Dominic Pillai & Kiran Raj; M/s Presgrave & Matthews

Reported by S Barathi

JUDGMENT

Quay Chew Soon JC:

Introduction

[1] This is a judicial review application by the applicant *inter alia* for an order of *certiorari* to quash the decision of the first respondent ("appeals board") dated 23 July 2020. In essence the applicant seeks to challenge the appeals board's decision in allowing the second and third respondents' appeal regarding the planning permission dated 14 February 2012 given by the fourth respondent ("MBPP"), in respect of Phase 2B of the proposed development of two condominium blocks, 20-storey of 160 units and 120 units respectively, on Lot 20314, No. Hakmilik 167263, Mukim 13, Daerah Timur Laut, Pulau Pinang ("said decision").

[2] There were two other judicial review applications that emanated from the said decision. In all, there were three judicial review applications as described below. The facts, disputes and issues relating to all three judicial review applications are similar. The same set of solicitors acted in all three judicial review applications.

(i) Judicial Review Application No. PA-25-56-10-2020 ("JR No. 56") is the applicant's application *inter alia* for an order of *certiorari* to quash the said decision whereby the appeals board had allowed the appeal filed by William Ronald Hansen and Meryl Jean Williams *vide* Appeal Case No. LR/PP/3/2012;

(ii) Judicial Review Application No. PA-25-57-10-2020 ("JR No. 57") is the applicant's application *inter alia* for an order of *certiorari* to quash the said decision whereby the appeals board had allowed the appeal filed by Lee Peng Keong and Lim Lai Yin *vide* Appeal Case No. LR/PP/4/2012; and

(iii) Judicial Review Application No. PA-25-58-10-2020 ("JR No. 58") is the applicant's application *inter alia* for an order of *certiorari* to quash the said decision whereby the appeals board had allowed the appeal filed by Yip Cheen *vide* Appeal Case No. LR/PP/5/2012.

[3] In JR No. 58, the respondent therein Yip Cheen and MBPP recorded a consent judgment dated 7 February 2022. The terms of which are that the said decision be quashed by an order of *certiorari*. And that an order for *mandamus* be issued to MBPP to approve the plans based on the decision of MBPP to grant the planning permission dated 14 February 2012.

[4] I heard JR No. 56 and JR No. 57 together. I allowed both of those judicial review applications. Here are my grounds in respect of JR No. 57. A separate but similar ground have been written for JR No. 56.

Background Facts

[5] The applicant is the registered owner and developer of the land held under the original title which is known as No. Pendaftaran 4247 Lot 2225, Mukim 13, Daerah Timur Laut, Pulau Pinang with an acreage of 27.8294 acres ("master title"). The applicant submitted an application for planning permission on 13 August 1999 to develop the master title. The planning permission of the master title to construct 689 units of houses and condominiums at a density of 24.75 units per acre was approved by MBPP on 18 December 2000 *vide* approved development plan No. JPB/KM/2461/A [JPB/PM/3163(LB)] ("original planning permission").

[6] This approval for planning permission is considered as the master plan for the development on the master title. The calculation of density is based on the usual permissible density of 19.5 units per acre and maximum permissible density of 39 units per acre after taking into account the Bumiputra incentive. Otherwise, the permissible density is 15 units per acre and maximum density of 30 units per acre.

[7] Based on the land area of the master title, the applicant is entitled to a maximum density of 39 units per acre with 1,085 units. But the applicant had only applied to develop 689 units at a density of 24.75 units per acre. Despite the objections made by the property owners from the neighbouring Taman Century, the original planning permission was approved. No appeal was filed to challenge the approval granted and the basis for the calculation of density.

[8] The development on the master title was divided into three phases. The master title was surrendered and re-alienated into three separate titles. At the same time, portions of the land for public facilities which includes the roads, pump house, TNB substation and other public facilities were surrendered to the State Authority.

[9] Upon completion of the surrender and re-alienation of the master title, the following subdivided titles were issued to replace the master title.

Title	Parcel
Lot 11785, No. Hakmilik 117768, Daerah Timur Laut, Pulau Pinang (Phase 1 of the development).	1
Lot 11784, No. Hakmilik117767, Daerah Timur Laut, Pulau Pinang (Phase 2 of the development).	2
Lot 10285, No. Hakmilik 81707, Daerah Timur Laut, Pulau Pinang (Phase 3 of the development).	3

[10] The original planning permission consists of the following components.

Parcel 1

Type	No. of Units
Bungalow	54
Townhouse	2
Semi-Detached	11
Total	67

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Parcel 2

Type	No. of Units
Semi-Detached	14
Terrace	9
Block B : Luxury Condominium	102
Block C : Luxury Condominium	108
Block D : Apartments	203
Total	436

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Parcel 3

Type	No. of Units
Terrace	10
Block A : Deluxe Condominium	80
Block E : Apartments	48
Block F : Studio Apartments	48
Total	186

[11] The works on Parcel 1 commenced on 16 December 2003 and were completed with certificate of fitness issued in March 2007. After completion of Parcel 1 and more than ten years since the application for the original planning permission, the applicant decided to proceed with the development of Parcels 2 and 3.

[12] Due to site conditions, where substantial rocks were discovered at the area designated for Parcel 3, the applicant submitted an application to amend the original planning permission. Due to market demand for condominiums in the island of Penang in 2012, the applicant also applied to increase the density to 34.39 units per acre which is to construct 957 units of houses and condominiums. This would include:

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(i) 69 houses already build with certificate of fitness in Parcel 1; and

(ii) an additional 888 units of houses and condominiums to be constructed on the undeveloped land of Parcels 2 and 3.

[13] The application to amend was approved on 14 February 2012 *vide* approved development plan No. JPB/KM/4639/A [MPPP/OSC/PM(1272)/11(LB)] ("amended planning permission"). The following were approved by MBPP.

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Perihal Tanah

Bil.	No. Lot asal	Keluasan asal	No. Lot baru	Keluasan asal
1	10283	12.773	11785	13.000
2	10284	9.706	11784	9.264
3	10285	5.172	10285	5.172
	Jumlah	27.651		27.436

Cadangan Pembangunan

Jenis Perumahan	Bilangan Unit	Bilangan Tingkat
Parcel 3 Rumah Teres Jenis A	48	3
Parcel 3 Rumah Teres Jenis B (Corner Annex)	5	3
Parcel 3 Rumah Teres Jenis C (Corner)	3	3
Parcel 2A Block A : Kondominium	552	
Parcel 2B Block B : Kondominium	280	
Jumlah Keseluruhan Skim Pembangunan	888	

Jumlah penduduk keseluruhan = 5 penduduk/unit/ x jumlah unit

= 5 x 888

= 4,440 penduduk

Densiti org/ekar = 4,440/27.436

= 161.83

unit/ekar = 888/27.436

= 32.37

Melalui kelulusan kebenaran merancang yang diluluskan No.: JPB/KM/2461/A (JPB/PM/3163 [LB]) bertarikh 18 Disember 2000:

1. Keluasan tanah keseluruhan Lot 2225 (Lot baru – Lot 10285, 11784 & 11785) = 27.8294 ekar

   Ketumpatan yang dibenarkan kepada pemohon bumiputra = 19.5 unit/ekar Ketumpatan maksima yang dibenarkan kepada pemohon bumiputra = 39 unit/ekar

2. Jumlah unit kediaman yang dibenarkan untuk pembangunan kepada pemohon bumiputra = 19.5 x 27.8294 ekar = 542 unit

   Jumlah unit kediaman maksima yang dibenarkan untuk pembangunan kepada pemohon bumiputra = 39 x 27.8294 ekar = 1,085 unit

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3. Melalui kebenaran merancang No. JPB/KM/2461/A (JPB/PM 3163/(LB)) bertarikh 18hb Disember 2000 dan jumlah unit yang disiap dibina serta sijil layak menduduki telah diperolehi adalah 69 unit rumah sesebuah 3 tingkat.

4. Maka jumlah bilangan unit maksima yang dibenarkan untuk pembangunan = 1,085 - 69 = 1,016 unit

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5. Jumlah bilangan unit yang dicadangkan untuk pembangunan = 888 unit (mematuhi ketumpatan maksima yang dibenarkan)

6. Maka densiti baru yang dicadangkan untuk pembangunan =

888 (cadangan baru) + 69 (sijil layak menduduki telah diperolehi)

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27.8294 ekar

= 957 / 27.8294 = 34.39 unit/ekar (mematuhi ketumpatan maksima yang dibenarkan)

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[14] The calculation of density is based on the same land area of the master title. The maximum permissible density is 39 units per acre for a Bumiputra developer such as the applicant. The amended planning permission was approved with a density of 34.39 units per acre, which is still within the permissible limit of 39 units per acre.

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[15] Being aggrieved with the decision of MBPP to grant the amended planning permission, the following owners of 3-storey terrace houses located at Taman Century (which is adjoining to Lot 11784) filed the following appeals to the appeals board pursuant to s. 22(3) of the Town and Country Planning Act 1976 ("TCPA").

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Owner(s)	House	Appeal No.
William Ronald Hansen Meryl Jean Williams	No. 16, Lorong Batu Uban Satu, 11700 Gelugor, Penang	LR/PP/3/2012
Lee Peng Keong Lim Lai Yin	No. 18, Lorong Batu Uban Satu, 11700 Gelugor, Penang	LR/PP/4/2012
Yip Cheen	No. 22, Lorong Batu Uban Satu, 11700 Gelugor, Penang	LR/PP/5/2012

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[16] In the notices of appeal filed by the owners, the issues raised by them are as follows:

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(i) Parcel 2B is contrary to 'Garis Panduan Pemeliharaan Topografi Semulajadi dalam Perancangan dan Pembangunan Fizikal Mengikut (Piawaian Perancangan JPBD 15/97)' and 'Perumahan Berbilang Tingkat (Piawaian Perancangan JPBD 2/99)';

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(ii) Parcel 2B does not respect the natural skyline defined by the existing houses to the east and west; and

(iii) Parcel 2B does not respect the requirement for space from an existing building, defined in terms of both horizontal space and vertical height.

[17] At the hearing of the appeals, the appeals board on its own accord raised the following issues:

(i) housing unit density and whether density can be transferred from an existing development to a proposed development; and

(ii) set back standard in comparable cities on islands: set back standards applied in Singapore to condominiums proposed to be constructed next to bungalows and semi-detached housing.

[18] The aforementioned three appeals were heard together by the appeals board. The hearings before the appeals board proceeded on 15 January 2013, 4 February 2013, 13 May 2013, 10 June 2013, 15 November 2013, 23 December 2013, 3 February 2014 and 13 February 2014 with hearing of the applicant's witnesses. There were no witnesses called by the owners.

[19] After conclusion of the hearing, the applicant requested for the *verbatim* notes of proceedings to be transcribed. The *verbatim* notes were transcribed by the applicant and was forwarded to the other parties for verification. After the notes of proceedings were verified by the other parties, the notes were forwarded to the appeals board by letter dated 17 May 2015 to be verified by the Chairman of the appeals board.

[20] After four years, by letter dated 16 May 2019, the appeals board fixed the three appeals for case management. At the case management, the Chairman of the appeals board gave the following directions:

(i) the applicant to forward the notes of proceedings to the appeals board, the owners and MBPP by 19 June 2019. All parties to revert with their comments by 15 July 2019;

(ii) if there is no response from the appeals board by 30 July 2019, it is assumed that no amendments will be made by the appeals board to the notes of proceedings; and

(iii) the owners to file written submissions by 2 August 2019; the applicant and MBPP to file their respective written submissions by 2 October 2019; and a decision date will be fixed by the appeals board.

[21] On 23 July 2020, the appeals board delivered the said decision and allowed the three appeals. Pursuant to the said decision, the appeals board set aside part of the amended planning permission that relates to the development of two blocks of condominium in Phase 2B on part of Lot 11784 which consist of 280 units of condominium. The appeals board made an order that part of the amended planning permission in respect of the development of Phase 2B for the construction of two blocks of 20-storey

condominium comprising of 160 units and 120 units be annulled. Following the said decision, the applicant filed (i) JR No. 56, (ii) JR No. 57 and (iii) JR No. 58 to challenge the said decision.

Legislative Framework

[22] In the appeals before the appeals board, the planning permission approved pursuant to the TCPA was examined. It would be useful to understand the applicable legislative framework upon which the application for planning permission was approved.

[23] The hierarchy of the various planning bodies for the proper control and regulation of town and country planning in Peninsular Malaysia (except the Federal Territories) is as follows:

(i) the National Physical Planning Council (s. 2A);

(ii) the Director General of Town and Country Planning (s. 2B);

(iii) the State Authority shall be responsible for the general policy in respect of the planning of the development and use of all lands and buildings in the State (s. 3);

(iv) the State Planning Committee may from time to time give any local planning authority directions, of which the local planning authority is to give effect to such directions (s. 4); and

(v) the local planning authority (s. 5).

[24] Section 22(2) of the TCPA sets out matters that the local planning authority must take into consideration in dealing with an application for planning permission.

> In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular:
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> (a) the provisions of the development plan, if any;
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> (aa) the direction given by the Committee, if any;
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> (b) the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those provisions;
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> (ba) the provisions of the Sewerage Services Act 1993;
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> (bb) the development proposal report;
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> (bc) the provisions of the Solid Waste and Public Cleansing Management Act 2007 [Act 672]; and
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> (c) the objections, if any, made under section 21.

[25] 'Development plan' is defined in s. 2 of the TCPA as:

> 'development plan', in relation to an area, means:
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> (a) a local plan for the area; or
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> (b) if there is no local plan for the area, the structure plan for the area;
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> and, in relation to any land or building, means the development plan, as so defined, for the area in which the land or building is situated.

[26] All planning matters in a State are decided by the State Authority, the State Planning Committee and the local planning authority taking into account the framework of the national policy (s. 4(4)(a) of the TCPA). But the State Planning Committee is entitled on its own initiative to advise the State Government on matters relating to the conservation, use and development of land in the State (s. 4(4)(b) of the TCPA).

[27] The framework of national policies formulated by the National Physical Planning Council and the Director General of Town and Country Planning are general guidelines. Except when for a proposed development under s. 22(2A) of the TCPA where the State Planning Committee must obtain advice from the National Physical Planning Council.

[28] Section 22(2A) of the TCPA reads:

> Where an application submitted under this section involves:
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> (a) the development of a new township for a population exceeding ten thousand, or covering an area of more than one hundred hectares, or both;
>
> (b) a development for the construction of any major infrastructure or utility; or
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> (c) a development affecting hill tops or hill slopes, in an area designated as environmentally sensitive in a development plan,
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> the Committee shall request from the Council its advice on the application submitted.

[29] In considering and granting an application for planning permission, the local planning authority has to take into account the matters stated in s. 22(3) and 22(4) of the TCPA which reads:

> 22(3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.
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> 22(4) The local planning authority shall not grant planning permission if:
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> (a) the development in respect of which the permission is applied for would contravene any provision of the development plan;

A (aa) the development in respect of which the permission is applied for would contravene the provision of paragraph (2)(aa); or

(b) the applicant for planning permission has neither paid the development charge payable in respect of the development nor obtained the permission of the local planning authority under subsection 34(1) to pay the development charge by instalments.

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[30] Since the local plan is yet to be gazetted, in the State of Penang the relevant development plan to be considered is the structure plan. On matters relating to construction of building, it is the local planning authority that will give directions on various matters relating to the level of the site of the C building, elevations, line of frontage and set back of the building to a building line.

[31] This is provided in s. 21(3) of the TCPA which reads:

Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect D of any of the following matters, that is to say:

(a) the level of the site of the building;

(b) the line of frontage with neighbouring buildings;

(c) the elevations of the building;

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(d) the class, design, and appearance of the building;

(e) the setting back of the building to a building line;

(f) access to the land on which the building is to be erected; and

F (g) any other matter that the local planning authority considers necessary for purposes of planning.

Law Relating To Judicial Review

[32] The decision of inferior tribunals may be reviewed for both process and substance on the grounds of illegality, irrationality, procedural G impropriety and proportionality. See the Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

[33] On planning matters and decisions made or conditions imposed by planning authorities under the TCPA, the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan* H *Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1 at pp. 48 to 50 held that they must not be unreasonable. Unreasonable in the sense that the decisions made or conditions imposed were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; or if they involved such oppressive or gratuitous I interference with the rights of those subject to them as could find no justification in the minds of reasonable men. The decision made or condition imposed will be invalid if it is so clearly unreasonable that no reasonable planning authority could have made or imposed it.

Decision

[34] The appeals before the appeals board and the judicial review applications before me are concerned only with that part of the amended planning permission which relates to Parcel 2B. The second and third respondents do not seek to disturb the development of Parcel 2A and Parcel 3.

[35] A perusal of the grounds of decision of the appeals board reveals that the appeals board had set aside the amended planning permission in part (*ie*, involving the development of Parcel 2B) based on the issue of density of the undeveloped lots. The appeals board held that the amended planning permission is a new approval which is materially different from the original planning permission. The appeals board excluded the land area for Phase 1, which had already been developed, from the density calculation for the amended planning permission.

[36] The relevant extract of the grounds of decision dated 28 March 2020 of the appeals board reads:

> The 2nd Planning Application - for amendment, or new?
>
> 3.5 We have no hesitation in finding that the 2nd Planning Application is a fresh application by the Developer for a new planning permission which is materially different from the 2000 Approval. We are not persuaded by the Developer's argument that the 2nd Planning Application is an application to amend the 2000 Approval. There are several reasons:
>
> (a) Factually, the two applications (a decade apart) underwent the full processes under the Town & Country Planning Act 1976 ("the Act"); including the holding of enquiries to hear objections from neighbouring landowners. It shows that they are separate applications – the second is not part and parcel of the first.
>
> (b) The two applications resulted in two separate approvals (given a decade apart), for developments which are substantially dissimilar with each other, in material aspects. As an example, the 2012 Approval gave permission for the development of one block of 4-storey 'Pejabat Jualan'; which was not applied for a decade earlier, and which is completely outside the ambit of the 2000 Approval. It would be a strain, indeed a disintegration, of language to call this an 'amendment'.
>
> (c) A local planning authority may, before considering to grant a planning permission, require a planning applicant to alter or modify any part of its application. After the grant of a planning permission, however, there is no provision under the Act for an 'amendment application' to be made.
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> ...

A The issue of density for the Undeveloped Lots

...

4.7 We therefore hold that the density for the Undeveloped Lots is to be worked out over the Undeveloped Lots themselves (*ie*, without involving Lot 11785 which had already been developed). When this is
B done, it will be found that the 2012 Approval has allowed a density of 64 units per acre [*ie*, 888 units divided by 13.8 acres] for the Undeveloped Lots (even before taking into account the block of 4-storey 'Pejabat Jualan').

4.8 This is way beyond the maximum permissible density of 30 units per
C acre, prescribed for the subject lands.

4.9 There is a contention by the Developer that the maximum permissible density for the Undeveloped Lots can be raised to 39 units per acre; which is disputed by the Appellants. We find no need to adjudicate on this dispute; because, even if we were to accept it as correct, the density
D (of 64 units per acre) allowed under the 2012 Approval remains unjustifiable by a long way.

4.10 The above is sufficient to dispose of the issue of excessive density.

...

E 6.1 The Orders of this Board are as follows:

(a) The planning permission granted by the respondent on 14 February 2012 is hereby set aside in part; in that the approval for the construction of 2 blocks of condominium (consisting of 280 units) on Parcel 2B (Lot 20314) is rescinded or annulled.

F **[37]** It is my finding that the appeals board, in setting aside part of the amended planning permission, had acted illegally, irrationally and unreasonably. Therefore, warranting this court to intervene and allow the applicant's application for judicial review. Here are my reasons.

The Amended Planning Permission Is An Amendment To The Original
G **Planning Permission, Not A New Application**

[38] The appeals board held that the amended planning permission is a fresh application by the applicant for a new planning approval. Which is materially different from the original planning permission. On this, I find that the appeals board fell into error due to the following reasons.

H

[39] The original planning permission and the amended planning permission are not separate applications that are independent of each other. They relate to the planning of the same land *ie*, the master title. The amended planning permission in effect is an amendment to the original planning permission. Where it seeks to amend the development already approved by
I MBPP pursuant to the original planning permission.

[40] The applicant had already completed development of Phase 1. The applicant then submitted the amended planning permission which was in effect to amend the original planning permission. Pursuant to the amended planning permission, the applicant sought approval for the development in three phases *ie*, Phase 2A, Phase 2B and Phase 3.

[41] Pursuant to the amended planning permission application, the density of the development was increased from 24.75 units per acre (involving 689 units) to 32.37 units per acre (involving 888 units). The amended planning permission application was approved by MBPP on 14 February 2012.

[42] MBPP had approved the amended planning permission application with the density of 32.37 units per acre. Such density was still within the maximum density of 39 units per acre calculated based on the approval of the original planning permission.

[43] This is further illustrated in the amended planning permission itself, where references were made to the original planning permission. I agree with the applicant and MBPP that the amended planning permission in essence is an amendment of and is related to the original planning permission. This is supported by the following.

[44] First, the amended planning permission referred to the original planning permission in the schedule titled 'Data-Data Pembangunan Perihal Tanah' relating to the size of the original lot and method of calculation of density. Wherein it was stated:

> Melalui Kelulusan Kebenaran Merancang yang Diluluskan No. JPB/KM/2461/A (JPB/PM/3163(LB)) bertarikh 18 Disember 2000.

[45] On this note, the second and third respondents' contention that no reference was made in any of the applicant's documents that there was an amendment to the original planning permission is inaccurate. Reference was indeed made to the master title and the original planning permission when the amended planning permission was approved. This is evident from the approved development plan No. MPPP/OSC/PM (1272)/11(LB)) (*ie*, the amended planning permission) which clearly makes reference to the earlier approved development plan No. JPB/PM/3163(LB) approved by MBPP on 18 December 2000 (*ie*, the original planning permission).

[46] Under the title 'perihal tanah', reference was made to the size of the master title and the subdivided titles. These plans were signed by the applicant and its architect, town planner and engineer and approved by MBPP. Thus, all parties concerned were fully aware that the application they were dealing with is an application to amend the original planning permission.

[47] Second, reference was also made to the original planning permission in the comments by Jabatan Perancang Bandar dan Desa Pulau Pinang ("JPBD") dated 2 June 2011. Where the JPBD had confirmed it has no objections to the amended planning permission subject to *inter alia* the condition that it must be read together with the original planning permission.

> Permohonan ini hendaklah dibaca bersama-sama dengan Pelan Kebenaran Merancang yang diluluskan no. rujukan No. JPB/KM/2461/A (JPB/PM/3163 (LB).

[48] Next, the substance of the amended planning permission that was submitted to MBPP is an application to amend the original planning permission. As it relates to a continuous development on the master title. The development in the amended planning permission relate to lands which had been subdivided pursuant to the original planning permission and developed in phases.

[49] The amended planning permission was an amendment to the uncompleted parts of the development *ie*, Phase 2 and 3 of the original planning permission. Pursuant to which the original land under the master title had been surrendered and subdivided. At the same time, portions of the land for public facilities which includes the roads, pump house, TNB substation and other public facilities were surrendered to the State Authority.

[50] When the planning permission is approved in respect of a particular land (in this case, the master title) and if the development had commenced, then pursuant to s. 24(1) of the TCPA, the planning permission will not lapse but will continue to subsist. By reason that part of the land has been developed based on the said planning permission which was approved.

[51] In the event that there are any changes to be made to the component or any layout of the development in the original planning permission, then a new application is to be made to amend the original planning permission. Since there is already an existing master plan which is still subsisting for the development of the master title it does not make sense for a separate and distinct application to be submitted when there is already a previous approval (which is still subsisting) granted to the applicant for the development of the master title.

[52] This was explained in the testimony of Haji Roslan bin Ramly ("Haji Roslan"), the Deputy Director of MBPP's Planning Department, which the appeals board had failed to consider. Haji Roslan testified that the amended planning permission is an application to amend the original planning permission.

> BTJ : Tuan Haji, you said just now that the, it is considered as an amended KM application ya, it's an **amended KM application in terms of calculation of density** and other technical matters. Is that correct?

A : **Ya.**

Chairman : In terms of?

A : The calculation of density and in terms of other technical matters.

Chairman : Too vague lah.

BTJ : That's the answer given by him Mr Chairman.

(emphasis added)

[53] Haji Roslan explained that the amended planning permission is an application to amend the original planning permission. *Albeit* administratively it is considered as a new application so that MBPP can collect more fees.

BTJ : And you also said just now that in terms of calculation of density and when taking into account technical matters, it is an amended application. And subsequently you said but administratively, you said that **MPP or respondent will consider this as a new application because of the fees charged**. Can you explain to the board what's the difference in fees you are going to charge when it is an amended application and when it is a new application? And when, is that change in policy in MPP?

A : Secara administratively, okay, we feel that when we process again, as if it's a new, although its an amended plan, okay, we charge so little but the work that we, been carried out the same as a new application. That's the thing that we feel that we need to charge accordingly.

BTJ : So you, you're saying.

A: Okay.

Chairman : But the work we did are so much that we have to charge, to charge what?

A : Charge accordingly, charge the fee accordingly.

Chairman : Accordingly.

A : Because we have to process according to the Act, we have to serve the notice to the neighbouring lot, we have to call the, this is the things that day to day work you see. So we feel that it's, we need to charge the, as an, the new fees rather than the difference of the number.

Chairman : So it's all about money? It's all about too much work, too little money, so you.

A : No.

BTJ : And when did this?

A Chairman : No, I want an answer to my question. It's about too much work and too little money, so you want to charge more so you treat it as a new application. But **in essence it's an amended application**. Do you understand what I'm trying to say?

B A : Yes.

Chairman : You're telling us that?

A : Because we feel that, we feel that, as MPPP we feel that the more work that, although it's an amended plan but the work is actually the same process as a new plan, you see, so that
C we charge a new.

Chairman : But that doesn't paint a very good picture on MPPP isn't it? You're saying **in essence it is amended but because I feel that I'm doing too much work, so I administratively we treat it as new application so that I can collect more**. That's paints
D a very bad picture of MPPP.

DMS : We have to live with that.

BTJ : That is the.

Chairman : That's the answer you want to give?

E A : Yes.

Chairman : Okay.

(emphasis added)

[54] Haji Roslan confirmed that the amended planning permission is a
F 'pelan pindaan'.

A : Dato Pengerusi, dalam **permohonan parcel 2A, 2B dan 3 adalah pelan pindaan**.

BTJ : Macam mana?

G A : Ada pelan pindaan. Okay, walau bagaimanapun.

BTJ : Permohonan parcel.

A : 2A, 2B dan parcel 3 adalah pelan pindaan. Walau bagaimana pun **secara administrative di peringkat MPPP, kita mohon supaya ianya perlu dimukakan sebagai permohonan baru**.
H Administratively is ini. Untuk maklumkan, **segala cadangan di parcel 2A, 2B dan 3 adalah continuation daripada pelan asal**. Dari segi **pengiraan density** dan juga keperluan kehendak teknikal yang sedia ada.

Chairman : Jika begitu **mengapa secara adminstrative MPPP memerlukan**
I **mereka mengemukakan sebagai permohonan baru**?

A : Salah satu sebabnya kita ingin, sebab it's a process, then kita akan kutip balik berdasarkan yuran yang baru, keseluruhan yang dikemukakan.

Chairman : **So that they can collect yuran baru**. Tetapi ianya dianggap oleh MPPP sebagai permohonan baru ke permohonan pinda?

A : Pinda.

Chairman : Pinda?

A : Yes.

Chairman : But you just say you wanted it to be permohonan baru so that you can collect yuran baru. Dari segi, bukan dari segi developer, dari segi MPPP, ini adalah satu permohonan baru ke permohonan pindaan.

A : Dari segi MPPP, dari segi proses teknikal this ada, ada **permohonan yang lama**, it's a **pindaan kepada pelan asal**. Okay.

Chairman : Tetapi you pungut yuran baru?

A : Ya, kita akan pungut balik yuran baru.

Chairman : Yuran untuk permohonan baru ke yuran untuk pindaan?

A : Yuran untuk, yuran untuk, okay, cuma boleh saya explain how the calculation, how about yuran?

Chairman : Tapi itu yuran untuk permohonan baru ke yuran untuk permohonan pindaan? Dia ada dua scale bukan?

A : Ya, ada dua scale. Kalau pindaan sebagai contoh, sebagai contoh kalau asal permohonan ada 8 unit, okay, dan ada pindaan dijadikan 10 unit, makna kita akan kutip 2 sahaja, 2, beza 2 ya, 2 unit sahaja yang kenakan yuran. Tapi dalam kes ini kita akan kutip yang 10 units, apa itu dari segi yuran, pengiraan.

Chairman : Mengapa? Kerana ada tambahan 10 unit?

A : Tidak. Tambahan cuma 2 unit sahaja tapi segi administratively kita menganggapkan bahawa kita perlu proses balik seperti biasa. Kita akan, it's more on administratively.

Chairman : So what I want to know is from the MPPP's points of view, was this new, was this treated, ini dianggap sebagai, dari segi MPPP, adakah **permohonan ini dianggap sebagai permohonan baru atau permohonan pindaan**? Itu sahaja yang saya nak tahu.

A : It's a pindaan kepada.

Chairman : Pindaan?

A : Ya.

(emphasis added)

[55] In short, Haji Roslan explained that in terms of planning and technical matters, the amended planning permission is an application to amend the original planning permission. Although administratively it is considered as a new application in order to collect fees. It seems to me that whatever label is put to the same, the amended planning permission is an amendment to the original planning permission as it is a continuous development of the same piece of land which is the master title. The substance of it shows that it is an application to amend the original planning permission.

[56] It is clear to me that the amended planning permission relates to the development of the undeveloped land of the master title. It is therefore an amendment to the original planning permission which is still subsisting.

[57] The fact that subdivided titles have been issued for the master title does not make any difference. As the evidence shows that the original planning permission is the master plan for the development of the master title which includes the three subdivided titles. In fact, the master title was subdivided based on the component of the development which the applicant had intended to develop under Phase 1, 2 and 3 (as shown in the original planning permission).

[58] After the master title was subdivided, Phase 1 was developed. But the land area for Phase 2 and 3 under the original planning permission remains undeveloped. The amended planning permission is for the same undeveloped land for Phase 2 and 3 under the original planning permission. Just that the component for development is now amended and divided into Phase 2A, 2B and 3 (as shown in the amended planning permission).

[59] It is noteworthy that Haji Roslan who gave evidence as the Pemangku Pengarah Perancangan Pembangunan MBPP is the officer from MBPP who had processed and approved the amended planning permission. The amended planning permission was signed by him. His evidence on this issue is therefore vital. But the appeals board failed to consider the same. There is no reason given in the grounds of decision of the appeals board as to why the evidence of Haji Roslan on this issue has been disregarded.

Calculation Of The Density For The Undeveloped Lots

[60] The undeveloped lots, as the appeals board referred to it in its grounds of decision, are Lot 10284 and Lot 10285 which pursuant to the original planning permission were intended for Phase 2 and Phase 3 of the development respectively. Pursuant to the amended planning permission, the applicant had proposed to amend the development for Phase 2 and Phase 3 to Phase 2A, 2B and 3.

[61] The development pursuant to the amended planning permission is set on parts of the original land under the master title which had been surrendered and subdivided pursuant to the original planning permission.

Thus, the applicant is entitled to take into account the total area of the original land in the master title for purpose of calculating the density for the amended planning permission.

[62] The calculation of density in respect of the development pursuant to the original planning permission was explained *inter alia* in the witness statement of Haji Roslan. Which is consistent with the applicant's calculation as set out in paras. 16.1 to 16.7 of the applicant's affidavit in support affirmed on 20 October 2020 filed herein. The said calculation as to density in respect of the planning permission is based on MBPP's 'Guidelines for Density Control for Areas outside Georgetown'.

[63] Pursuant to the amended planning permission, the density of the development was increased from 24.75 units per acre (involving 689 units) to 32.37 units per acre (involving 888 units). MBPP had approved the amended planning permission with the density of 32.37 units per acre as such density was still within the maximum density of 39 units per acre calculated based on the approval of the original planning permission.

[64] In approving the density for the amended planning permission and considering the maximum density for the proposed development, MBPP had taken into account various considerations as set out in the witness statement of Haji Roslan which is reproduced below.

J14: Perkara-perkara yang perlu diambil kira dalam membenarkan ketumpatan maksima adalah seperti yang dinyatakan dalam Mesyuarat SPEAD bertarikh 26 Mei 2003 di mana antaranya adalah keupayaan sistem pembentungan dan kajian lalulintas sedia ada. Kebenaran Merancang Terpinda telah memenuhi kehendak ini. Selain daripada itu daripada penilaian perancangan, kawasan-kawasan bersebelahan pembangunan 2B ini juga adalah kawasan pembangunan berkepadatan tinggi. Lain-lain perkara yang diambil kira bagi memberi ketumpatan maksimum 30 unit seekar adalah:

(a) terdapat kekurangan tanah di Pulau Pinang dan di dalam RSN 2020, kadar pertumbuhan penduduk dijangkakan meningkat sehingga 2 juta pada tahun 2020;

(b) kekurangan tanah serta permintaan yang tinggi bagi perumahan menggalakkan pembangunan berkepadatan tinggi;

(c) pembangunan berkepadatan tinggi akan memberikan 'affordable accomodation' bagi penduduk di bahagian pulau di Negeri Pulau Pinang;

(d) kedudukan tanah Parcel 2B yang strategik bagi pembangunan kepadatan tinggi; dan

(e) pada masa ini juga Responden telah memberi kebenaran untuk ketumpatan setinggi 87 unit seekar bagi zon perumahan am tertakluk kepada syarat-syarat yang ditetapkan oleh Responden. Kawasan Parcel 2B adalah kawasan zon perumahan am.

[65] It appears that the above testimony by Haji Roslan was not taken into consideration by the appeals board in its grounds of decision.

[66] The calculation of density for the amended planning permission can also been seen in Haji Roslan's witness statement at Q&A 8 to Q&A 14. Wherein he had stated *inter alia*:

(i) The development on Parcel 2A, 2B and 3, pursuant to the amended planning permission, is a continuous development on the original land under the master title. The calculation of density for the amended planning permission is still based on the master title.

(ii) Density cannot be calculated based on the subdivided new titles as the development is on the original land under the master title. Which was surrendered and subdivided upon the original planning permission being approved.

(iii) Furthermore, all the infrastructure for the development had been surrendered to the relevant authorities based on the original planning permission, which is still valid and effective as the development Parcel 1 (Phase 1) had been commenced and completed.

(iv) Various factors are involved in a decision by MBPP to grant planning permission including as set out in s. 22(2) of the TCPA, the Rancangan Struktur Negeri Pulau Pinang 2020 ("RSN 2020") and directions by the State Planning Committee ("SPC"). The additional incentive (bonus) of 30% additional density to Bumiputra developers is set out in RSN 2020 and also is a direction from SPC. Matters relating to the policy practiced by the State Government are part of the planning considerations to be taken into account in a planning application.

(v) The applicant is entitled to be considered a Bumiputra developer (and therefore entitled to the 30% additional density which brings the maximum density to 39 units per acre).

(vi) The proposed development as per the amended planning permission complied with the open space requirement as set out in RSN 2020.

(vii) The factors considered by MBPP in allowing the density to be increased for the proposed development on Parcel 2A, 2B and 3.

[67] I am satisfied that the appeals board was wrong to exclude parts of the original land under the master title which had been developed or surrendered to the relevant authorities pursuant to the original planning permission. Instead, the appeals board only confined itself to the undeveloped lots to calculate the density for the amended planning permission. That, in my opinion, is erroneous.

[68] Firstly, the density calculation for the original planning permission and the amended planning permission should not be calculated separately. Secondly, the density calculation for the amended planning permission should not exclude the land area for Phase 1 (which had already been developed).

[69] This issue was explained by Puan Khairiah, an expert witness called by the applicant. She has vast experience in planning matters and was the past President of the Malaysian Institute of Planners. She testified that the calculation of density has to include Phase 1 as the master plan for the area is based on the master title. And that the density calculation is calculated at the macro level based on the master title.

A : I, I see the, my mistake here, Mr Chairman. It should be, not Master Plan level, master title level. Should be master title level.

Chairman : No, now you want to amend it to master title?

A : Yes, please. Because I just realised it, yes.

Chairman : It should not be Master Plan.

A : Because I'm so used to doing Master Plan, that's why I automatically say it's a Master Plan. Yes, and I request for.

Chairman : What I mean is on Master Title level.

A : Yes.

Chairman : Okay. Next question?

CEK : So actually, so Puan Khairiah, your answer is actually **density is to be calculated at the Master, Master Title level**?

A : **Master Title, yes**.

(emphasis added)

[70] The crux of density calculation in terms of planning is to ensure that sufficient infrastructure is provided on a macro level for the development. In calculating density, the considerations which will be taken into account, as testified by Puan Khairiah, are: (i) existing infrastructure; (ii) sufficient provision of water and electricity; (iii) roads to accommodate traffic; (iv) provision of community facilities; and (v) schools, dewan orang ramai, mosques, fire service stations and police stations.

[71] Interestingly, the Chairman of the appeals board considered Puan Khairiah as a very 'knowledgeable' witness. But seems to have disregarded her evidence.

Chairman : And I can sense that the witness is less than objective. The best way to help your client who are sitting behind and I can assure you that I have heard many witnesses, you are one of the most knowledgeable ones. The best way to help your client.

[72] One final point. The appeals board alluded to the 4-storey 'Pejabat Jualan' in its grounds of decision. With regard to that issue, the 4-storey 'Pejabat Jualan' approved by MBPP is the commercial component of the amended planning permission. It complied with MBPP's 'Dasar Perancangan dan Kawalan Pemajuan Zon-Zon Kawalan Perancangan' contained in 'Pelan Dasar Perancangan dan Kawalan Pemajuan Pelan No. MPPP/PN-020 (PL/PP) (item (x))'. Wherein in areas zoned general housing (perumahan am), for mixed developments which is commercial development within a housing area, commercial development of up to 20% maximum floorspace is allowed. The approval of the 4-storey 'pejabat Jualan' does not make it a separate and unrelated development.

[73] I am satisfied that MBPP had taken into account the relevant planning considerations before approving the amended planning permission. MBPP has taken into account relevant documents *ie*, the RSN 2020 and MBPP's guidelines, in considering the applicant's application to amend the original planning permission. My opinion is that the amended planning permission is proper and ought not to have been annulled by the appeals board.

Orders

[74] It is my finding that the applicant is entitled to the reliefs sought in the judicial review against the said decision of the appeals board. The said decision is tainted with illegality. In that the appeals board had failed to take into consideration relevant matters and had taken into consideration irrelevant matters. It is also tainted with irrationality or '*Wednesbury* unreasonableness'. In that the said decision was 'so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it'.

[75] For completeness, I would mention that the applicant had advanced arguments based on procedural impropriety. To wit that the appeals board failed to observe basic rules of natural justice by deciding on an issue which was not raised or argued before it. That the said decision was biased. The applicant raised issues concerning the composition failure of the appeals board during the proceedings. And the conduct of the Chairman of the appeals board who allegedly, constantly and frequently interfered with the witnesses of the applicant. The applicant also complained of inordinate delay. In that even though the appeals were filed in 2012, the said decision was only delivered on 23 July 2020 which is approximately eight years after the proceedings before the appeals board commenced. I did not consider it necessary to address those arguments. It was sufficient for me to determine that this judicial review application ought to be allowed on the grounds of illegality, irrationality and unreasonableness.

[76] MBPP stands by the amended planning permission approved by it and therefore does not object to the judicial review application by the applicant. Except that para. 1.2 of the judicial review application should instead read as follows:

> Satu Perintah *mandamus* dikeluarkan untuk keputusan Responden Keempat yang terkandung di dalam Kebenaran Merancang Borang C (1) bertarikh 14 Februari 2012 dikekalkan dan Responden Keempat memproses segala pelan-pelan permohonan dan cadangan pembangunan yang dikemukakan oleh Pemohon menurut undang-undang dan garispanduan-garispanduan yang terpakai.

[77] The applicant agreed to the proposed amendment as set out above. The same is necessary to ensure that MBPP maintains its discretion to process all subsequent plans to the planning permission according to the law and the applicable guidelines. Accordingly, I allowed the order for *mandamus* as amended aforesaid.

Conclusion

[78] For the reasons above, I find that this is an appropriate case to warrant the intervention of the reviewing court. I therefore allowed the applicant's application for judicial review. I ordered the second and third respondents to pay costs of:

(i) RM10,000 to the applicant; and

(ii) RM5,000 to MBPP.